



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 17, 1994

Mr. Kevin McGraw  
Assistant City Attorney  
City of Waco  
Legal Services  
P.O. Box 2570  
Waco, Texas 76702-2570

OR94-727

Dear Mr. McGraw:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24133.

The City of Waco (the "city") received an open records request for various records pertaining to the relocation of the Veterans Administration Regional Office ("VA office") from its current location in Waco to a new site within the city's Central Community Business Area ("CBA"). In your letter to this office, you contend that the records contained in Appendix A come under the protection of section 552.103 of the Government Code.

To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You contend that litigation regarding the relocation of the VA office is reasonably anticipated because "[Humphreys Management has] filed three protests against the GSA's [i.e., the federal General Services Administration's] conduct of the site process, . . . they have hired a lawfirm to represent it, . . . it has made allegations and accusations of impropriety against the City, and . . . they have made an open records request" regarding the VA office. None of these facts, taken either alone or together, show that the requested material meets the section 552.103 tests. See also Open Records Decision No. 392

(1983) (litigation exception applies only where the litigation involves the governmental body claiming the exception). *Compare* Open Records Decision No. 361 (1983) (open records request made by an attorney on behalf of a rejected applicant) *with* Open Records Decision No. 551 (1990) (attorney's letter demanding damages and threatening to file suit). Because you have not adequately demonstrated the likelihood of litigation against the city, the city may not withhold the information contained in Appendix A pursuant to section 552.103. You have raised none of the act's other exceptions to required public disclosure with regard to these records; consequently, the city must release all records contained in Appendix A.

You contend that the contents of Appendix B come under the protection of section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals and related information prior to the award of a contract.

In your original correspondence to this office, you explain that one of the possible sites for the new VA office is owned by the city, and that the city has issued a Request for Proposal ("RFP") for the construction of the new facility which would then in turn be purchased by the GSA. "Appendix B" includes the following documents:

- A proposed process for evaluating and prequalifying potential developers for the VA project on the city-owned site;
- an appraisal and value information regarding the city-owned site;
- an environmental data survey sent to the city by the GSA which lists the sites other than the city-owned site;
- three environmental assessments prepared by or on behalf of the GSA of the city-owned site; and
- a proposal for performing a "Phase II Environmental Site Assessment" on the city-owned site.

Your argument for withholding these records pursuant to section 552.104 is twofold. First, you contend that the release of the records to the requestor would unfairly benefit the requestor, a potential bidder, over other potential bidders in the event that the

city-owned site is selected by the GSA.<sup>1</sup> However, Mr. Clarence Burroughs with the GSA has informed this office that the GSA will now be conducting the RFP for the construction of the new facility. Consequently, it appears to this office that the likelihood of the city awarding a contract on its RFP has ended. Because the information at issue does not relate to a pending competition for bids, the city may not withhold the information on these grounds. See Open Records Decision No. 201 (1978) (where no contract is awarded, section 552.104 is inapplicable).

You also contend that section 552.104 protects this information because the city-owned site is one of the sites being considered along with other sites for the new facility. This office has previously held that where competition is authorized by law, a governmental body must be afforded the right to claim the "competitive advantage" aspect of section 552.104. See Open Records Decision No. 593 (1991). You contend that because Federal Property Management Regulation D-76 ("FPMR D-76"), in conjunction with Executive Order 12072, requires that first consideration be given to CBA sites for "federal space needs" and that local government officials be consulted in the site selection process, this federal regulation authorizes the city to compete against those in the private sector for the site selection. However, a review of the federal regulation in no way reveals an explicit authorization of competition between public and private entities. FPMR D-76 only provides that "GSA will consult with local officials to identify CBA's." Because the city cannot be deemed a competitor in this instance for purposes of section 552.104, the city may not withhold Appendix B pursuant to this section.

You also contend that section 552.105 protects the contents of Appendix B. Section 552.105(2) protects "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property."<sup>2</sup> Although, contrary to the requestor's assertion, the city has not yet entered into a formal contract with the GSA with regard to the eventual purchase of the city-owned lot, we nevertheless believe section 552.105 is inapplicable in this instance. This office has addressed the applicability of this section only in instances where a governmental body, as defined in Government Code section 552.003, intends to acquire property for a public purpose. See, e.g., Open Records Decision No. 357 (1982). The opinions construing section [552.105], as well as the actual language of the exception, tie the provision to situations entailing the expenditure of public funds to acquire or use the subject property for public

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<sup>1</sup>Since the time that the city issued the RFP, the VA informed the GSA that the original space requirements for the new facility would have to be modified, with the result being that the originally proposed city-owned site by itself would be inadequate for the VA's needs. In a subsequent telephone conversation with one of our staff, you have informed us that the city is attempting to acquire additional land near the city-owned site in order to qualify for selection by the GSA.

<sup>2</sup>Although section 552.105(1) protects "the location of real or personal property for a public purpose prior to public announcement of the project," this subsection is clearly inapplicable here because the city council has publicly discussed the nature of the VA relocation and the location of the city-owned lot that would be the site of the new facility.

purposes in order to prevent speculation from inflating the price." Open Records Decision No. 590 (1991) at 4. Such concerns clearly are absent here, especially in light of the fact that the city has publicly announced the purchase price to which it and the GSA have agreed for the city-owned lot in the event that the lot is chosen for the site of the new VA facility. Consequently, section 552.105 is inapplicable here; the city therefore must release Appendix B in its entirety.

You seek to withhold Appendix C pursuant to section 552.106. Section 552.106 protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body; it protects the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Appendix C consists of a draft of a proposed city ordinance, prepared in anticipation of the GSA selecting the city-owned lot, that would authorize the city's sale of this property. As such, it clearly comes under the protection of section 552.106. The city may withhold this record from the requestor.

You contend that certain portions that you have marked in the first document contained in Appendix D come under the protection of section 552.107.<sup>3</sup> Section 552.107(1) protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. See Open Records Decision No. 574 (1990). The attorney-client privilege protects an attorney's written advice, but only if the advice is predominantly legal, as opposed to business, in nature. Open Records Decision No. 462 (1987) (citing *North Am. Mortgage Investors v. First Wisconsin Nat'l Bank of Milwaukee*, 69 F.R.D. 9, 11 (E.D. Wis. (1975))). To the extent that the first paragraph of this document may have at one time consisted of privileged communications between the city and its attorney, we believe that, except for the last sentence in the paragraph, the city has waived the privilege with regard to this information by the public announcement of details of the project. We agree, however, that the remaining two portions of this document that you have marked constitute legal advice that the city may withhold pursuant to section 552.107(1).

You contend that certain portions of the remaining documents in Appendix D come under the protection of section 552.111. Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to

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<sup>3</sup>Although you also contend that sections 552.104 and 552.105 also apply to portions of this and other documents contained in Appendix D, for the reasons discussed above, these exceptions are inapplicable here.

encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

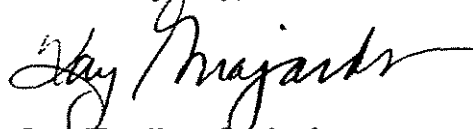
to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

Further, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. After reviewing the documents at issue, we believe that only one sentence that you have marked constitutes information pertaining to the city's policy-making process that is protected by section 552.111; we have marked this sentence accordingly. The remainder of these documents must be released.

Finally, you seek to withhold the ten documents contained in Appendix E pursuant to section 552.111 because they consist of drafts of documents contained in Appendix A. In Open Records Decision No. 559 (1990), this office held that a preliminary draft of a document that is intended for release in a final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document and as such may be withheld pursuant to former section 3(a)(11) of the Open Records Act (now found at section 552.111 of the Government Code). Because the city must release the final versions of the documents contained in Appendix A, the city may withhold the draft documents contained in Appendix E pursuant to section 552.111.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hamilton Guajardo  
Assistant Attorney General  
Open Government Section

KHG/RWP/rho

Ref.: ID# 24133

Enclosures: Submitted documents

cc: Mr. J. C. Snead  
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(w/o enclosures)